



Billing Code: 4410-30

**DEPARTMENT OF JUSTICE**

**28 CFR Part 16**

**[CPCLO Order No. 005-2019]**

**Privacy Act of 1974; Implementation**

**AGENCY:** United States Department of Justice, Executive Office for Immigration Review.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** In the Notices section of this issue of the Federal Register, the Executive Office for Immigration Review, (EOIR), a component within the United States Department of Justice (DOJ or Department), has published a notice of a new system of records: Office of the Chief Administrative Hearing Officer (OCAHO) Case Management System (CMS), JUSTICE/EOIR-002. In this notice of proposed rulemaking, the Department proposes for the reasons listed below to exempt this system of records from certain provisions of the Privacy Act in order to ensure the integrity of investigatory and adjudicatory records in cases before OCAHO. Public comment is invited.

**DATES:** Send comments by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may send comments by any of the following methods:

- E-mail: [privacy.compliance@usdoj.gov](mailto:privacy.compliance@usdoj.gov). To ensure proper handling, please reference the CPCLO Order No. in the subject line of the message.
- Fax: 202-307-0693.

- Mail: United States Department of Justice, Office of Privacy and Civil Liberties, ATTN: Privacy Analyst, 145 N Street, NE, Suite 8W.300, Washington, DC 20530. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes. To ensure proper handling, please reference the CPCLO Order No. in your correspondence.
- Federal eRulemaking Portal: <http://www.regulations.gov>. When submitting comments electronically, you must include the CPCLO Order No. in the subject box. Please note that electronic comments must be submitted before midnight Eastern Daylight Saving Time on the day the comment period closes, and the website for comments, <http://www.regulations.gov>, will stop receiving comments at that time. Commenters in other time zones should adjust the times for their submission accordingly.

*Posting of Public Comments:* Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov> and in the Department's public docket. Such information includes any personally identifying information (such as name, address, etc.) voluntarily submitted by the commenter. If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "PERSONALLY IDENTIFYING INFORMATION" in the first paragraph of your comment. All personally identifying information that you do not want posted online or made available in the public docket should be placed in the first paragraph of your comment, where you should identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information that you wish to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personally identifying information and confidential business information identified and located as set forth above, will to the extent feasible be redacted, and the comment, in redacted form, may be posted online and placed in the Department’s public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency’s public docket file in person by appointment, please see the “FOR FURTHER INFORMATION CONTACT” section, below.

**FOR FURTHER INFORMATION CONTACT:** Marta Rothwarf and Michelle Curry, Associate General Counsels and Co-Senior Component Officials for Privacy, Office of the General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041, by e-mail at *marta.rothwarf2@usdoj.gov* and *michelle.curry@usdoj.gov*, or by facsimile at 703-305-0443.

**SUPPLEMENTARY INFORMATION:**

EOIR proposes to establish a new system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a. The proposed system of records will be used by OCAHO to facilitate adjudication of its cases and may include paper and electronic files maintained

by OCAHO. The records to be maintained in this new system historically have been included as part of EOIR-001, Records and Management Information System. They are being transferred into this new system to improve efficiency, improve records management practices, and provide better access for parties to proceedings.

OCAHO Administrative Law Judges (ALJs) hear cases and adjudicate issues arising under the provisions of the Immigration and Nationality Act (INA) relating to: (1) knowingly hiring, recruiting or referring for a fee, or continuing to employ unauthorized aliens, failure to comply with employment eligibility verification requirements, and requiring indemnity bonds from employees in violation of section 274A of the INA (8 U.S.C. 1324a), (2) immigration-related unfair employment practices in violation of section 274B of the INA (8 U.S.C. 1324b), and (3) immigration-related document fraud in violation of section 274C of the INA (8 U.S.C. 1324c).

Complaints under sections 274A and 274C of the INA are filed by the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE). Complaints under section 274B of the INA may be filed by private individuals or entities, or by the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (DOJ/CRT). The respondents in OCAHO cases are typically businesses or employers. The parties to 274A and 274C cases may seek administrative review of ALJ decisions and orders by the Chief Administrative Hearing Officer (CAHO). Parties in all case types may appeal final agency orders to the appropriate United States Circuit Court of Appeals.

In order to process and adjudicate cases and appeals, OCAHO must collect certain information and documents from and about complainants and respondents. The

DOJ/CRT and DHS ICE can file complaints with OCAHO. Often, these agencies will submit investigatory records as exhibits or attachments to other filings. The investigatory records include, but are not limited to, notices of inspection, summaries of inspection results, affidavits or memoranda from investigators, results from searches of internal agency databases, and similar records. These exhibits or attachments then become part of OCAHO's official case record.

To improve tracking and storage of case-related information and documents, OCAHO is implementing a new electronic case management system (CMS). The OCAHO CMS will manage the entire life cycle of OCAHO's case processes, including tracking and managing case information and documents, facilitating case research, and reporting on key business functions and metrics. The OCAHO CMS will also include an electronic filing capability, which will enable parties to submit case information and documents electronically through a secure web-based portal. The portal will also provide notifications and updates on case status, and will allow authorized parties to access copies of all case-related documents electronically. The system is segregated by "need to know" user controls and allows authorized users to track various stages of the proceedings. The system also contains templates to generate letters, notices, and decisions used in the OCAHO process. The system can generate reports by case status and disposition.

#### **Executive Orders 12866, 13563, 13771—Regulatory Review**

In accordance with 5 U.S.C. 552a(j) and 552a(k), this proposed action is subject to rulemaking procedures by giving interested persons an opportunity to participate in the rulemaking process "through submission of written data, views, or arguments," pursuant to 5 U.S.C. 553. The exemptions claimed by the system, as detailed below, do not raise

novel legal or policy issues, nor do they adversely affect the economy, the budgetary impact of entitlements, grants, user fees, loan programs, or the rights and obligations of recipients thereof in a material way. The Department of Justice has determined that this rule is not a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Information and Regulatory Affairs within the Office of Management and Budget.

#### **Regulatory Flexibility Act**

This proposed rule will only impact Privacy Act-protected records, which are personal and generally do not apply to an individual’s entrepreneurial capacity, subject to limited exceptions. Accordingly, the Chief Privacy and Civil Liberties Officer, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

#### **Congressional Review Act**

This proposed rule is not a major rule as defined by 5 U.S.C. 804 of the Congressional Review Act.

#### **Paperwork Reduction Act**

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires the Department to consider the impact of paperwork and other information collection burdens imposed on the public. The Paperwork Reduction Act applies to some of the records collected as part of this system of records. The following approved information collection is associated with this system of records: Form EOIR-58, Unfair Immigration-Related Employment Practices Complaint Form, and OMB #1125-0016. This system of

records will also collect information via a web-based electronic filing portal. The Department is in the process of seeking approval of this information collection under the Paperwork Reduction Act.

### **Unfunded Mandates Reform Act of 1995**

This proposed rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000, as adjusted for inflation, or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### **List of Subjects in 28 CFR Part 16**

Administrative Practices and Procedures, Courts, Freedom of Information, and the Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940-2008, the Department of Justice proposes to amend 28 CFR part 16 as follows:

### **Part 16- PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION**

1. The authority citation for part 16 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

2. Amend § 16.83 by adding paragraphs (e) and (f) to read as follows:

**§ 16.83 Exemption of the Executive Office for Immigration Review System—limited access.**

\* \* \* \* \*

(e) The following system of records is exempt from 5 U.S.C. 552a(d):

Office of the Chief Administrative Hearing Officer (OCAHO) Case Management System (CMS) (JUSTICE/EOIR-002). This exemption applies only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(k)(1) and (2).

(f) Exemption from the particular subsections are justified for the following reasons:

(1) In limited circumstances, from subsection (d) when access to the records contained in this system of records could inform the subject of an ongoing investigation of an actual or potential criminal, civil, or regulatory violation or the existence of that investigation; of the nature and scope of the information and evidence obtained as to the subject's activities; of the identity of confidential sources, witnesses, and law enforcement personnel; and of information that may enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law and regulatory enforcement where they prevent the successful completion of the investigation, endanger the physical safety of confidential sources, witnesses, and law enforcement personnel; and/or lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, granting access to such information could disclose security-sensitive or confidential business information or information that would constitute an unwarranted invasion of the personal privacy of third parties.

(2) From subsection (d)(2), (3), and (4) because the administrative case files constitute an official record which includes transcripts of administrative proceedings, investigatory materials, evidentiary materials such as exhibits, decisional memoranda,



and other case-related papers. Administrative due process could not be achieved by the ex parte “correction” of such materials by the individual who is the subject thereof.

Dated: August 7, 2019.

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Peter A. Winn  
Acting Chief Privacy and Civil Liberties Officer  
United States Department of Justice

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